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No. 08-416

Supreme Court, U.S.
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In The Supreme Court of the United States

NIELS LAUERSEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING WITH APPENDIX

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QUESTION PRESENTED FOR REHEARING

In Blakely v. Washington, 542 U.S. 296 (2004), this Court held that the Sixth Amendment's right to a jury trial is violated "[w]hen a judge inflicts *punishment* that the *jury's verdict alone* does not allow, [because] the jury has not found all the facts which the law makes essential to the punishment." Id. at 304. (emphasis added).

This Petition presents the following question: whether a restitution order under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A, which is based on factual findings made by the district court by a preponderance of the evidence – rather than on findings by a jury beyond a reasonable doubt or a defendant's admission – violates the Sixth Amendment's guarantee of a jury trial.

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PETITION FOR REHEARING

Petitioner prays to this Honorable Court for relief by rehearing from the denial of his Writ of Certiorari on November 3, 2008.

This petition for rehearing of the order denying the petition for a Writ of Certiorari is being filed within the 25-day limitation and complies with the form and filing requirements of Supreme Court Rule 44.

I. New and Controlling Supreme Court Decisions and Cases Still Pending.

A. Blakely v. Washington, 542 U.S. 296 (2004)

The restitution issue in Lauersen is related to the issue in Blakely decided by this Honorable Court. The issue is whether the restitution made by a judge sua sponte without a jury determination violate the Fifth and Sixth Amendments as delineated in Apprendi v. New Jersey, 530 U.S. 466 (2000).

B. Cunningham v. California, 127 S. Ct. 856, 868 (2007)

In Apprendi v. New Jersey, 530 U.S. 466 (2000), this Court established a "bright-line rule," Cunningham v. California, 127 S. Ct. 856, 868 (2007), that the Sixth Amendment right to jury trial requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a

crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi, 530 U.S. at 490. "[When a judge inflicts *punishment* that the *jury's verdict alone* does not allow, the jury has not found all the facts which the law makes essential to the punishment, ... and the judge exceeds his proper authority." Blakely v. Washington, 542 U.S. 296, 304 (2004) (emphasis added); see also Booker, 543 U.S. at 232 (defendant's Sixth Amendment right "is implicated whenever a judge seeks to impose a sentence that is *not solely based on facts reflected in the jury verdict* or admitted by the defendant").

C. Oregon v. Ice, U.S. No. 07-901 (Argued November 15, 2008)

The Supreme Court is currently deciding the issue in Ice that is related to Lauersen's restitution order and also involves the denial of the Fifth and Sixth Amendment rights enunciated in Apprendi Id.

Seventeen states, filing as *amici curiae*, explicitly recognize the impact Ice could have on restitution orders. If Oregon Supreme Court's decision is left standing, they argue, "Apprendi would govern decisions whether to ... require restitution" because "a person who is both incarcerated and ordered to pay ... restitution is exposed to greater punishment than a person who is only incarcerated" and "often requires specific factual determinations that lie outside the jury's verdict." *Amici Curiae* Brief of Indiana et al., at 3, 12.

Dr. Lauersen was enhanced from a level 6 to level 33 by the Court sua sponte without a jury determination after his jury trial.

Lauersen was raised from $150,000.00 to $4.9 million dollars sentencing exposure at the whim of a judge without the monetary element determination by a jury. This dramatically increased his sentence and restitution in violation of his constitutional rights. This violated the Due Process of the defendant at trial in raising his U.S.S.G. exposure by a lesser standard of proof - preponderance of the evidence by a judge, versus beyond a reasonable doubt standard determined by a jury.

STATEMENT

This case presents a frequently recurring and important question concerning a district court's ability to impose restitution on criminal defendants.

1. This case deals with an obstetrician/gynecologist fertility specialist, who has been singled out by the government for alleged fraudulent health care insurance billing. These alleged fraudulent claims were for fertilization techniques performed on behalf of women who could not conceive a child. In vitro fertilization, IVF, Gametes intra fallopian transfer, GIFT and Zygote Inter Fallopian Transfer, ZIFT were utilized.

This Manhattan physician has authored over thirteen women's health care books, three academic textbooks along with almost 100 research papers on gynecology, pregnancy and infertility.

His defense was that he during the alleged infertility cases, performed dual procedures, a covered GYN procedure and an often not covered fertility part free of charge.

After the first trial, the jury deadlocked and failed to return a verdict, and the district court granted Petitioner's motion for a mistrial. United States v. Lauersen, 2000 WL 675377 (S.D.N.Y. 2000).

The government filed another indictment against Petitioner with the same allegations. After the second trial, Dr. Niels Lauersen was convicted after a two month jury trial on January 9, 2001. Defendant's sentence was increased from a base offense level of 6 and possible probation, to level 29 and 87 months incarceration and later raised by the appeal court to eleven years because of the amount of loss found by the district court, but not proven by the jury.

Dr. Ratner, who was part of an anesthesia group, who worked for several doctors including Dr. Lauersen testified during the trials that he was a drug addict who had used drugs all of his adult life and was "stoned" even when he was given anesthesia. He testified that he had used drugs for so long that he know how to hide his addiction from Dr. Lauersen and others. Ratner cooperated with the prosecutors and provided them with a list that contained the names of patients he believed were misbilled by Dr. Lauersen's staff.

Ratner also testified that most of Dr. Lauersen's infertility patients had other medical problems. The fertility patients, a small part of the practice, could have had dual procedures (One to treat the medical problems and one to aid pregnancy). Ratner did his own billing and was never involved with Lauersen's billing procedures.

He testified that he stole the patients Demerol and injected himself during procedures. Ratner sat behind an anesthesia curtain and could not observe or know the procedures Dr. Lauersen was performing.

In at least one instance, Ratner was so high that he mistakenly injected himself with a syringe he thought had morphine but actually contained a paralyzing agent. He collapsed on the floor barely able to breath. He was saved by his collague Dr. Magda Binion, who he helped to convict with Dr. Lauersen. (See APPENDIX A1)

Because of Ratner's excessive drug use and confusion the names on the list he handed to the prosecutors should have been presented to the jury and the patients cross examined as to the type of operations they had, and for them to determine the loss amount.

Hopefully the court will consider a Rehearing since the facts upon which Lauersen was sentenced arrived from a very unreliable source, and created the base of his restitution.

Indeed, without a jury hearing to determine the true amount of Dr. Lauersen's restitution, and - call into question Dr. Ratner's flawed memory and personal bookkeeping – it appears virtually impossible to fairly and accurately put a dollar value on the loss amount, and to determine restitution.

Because the jury made no findings as to the amount of restitution, the district court made the findings necessary to order restitution. Relying on the presentence report prepared by the government, the district court identified the health insurance companies that qualified as "victims" under the MVRA. The court then determined the amount of loss that it believed each victim suffered, for a total of $3,240.597 in restitution.

2. Petitioner appealed to the Second Circuit, and the government cross-appealed. The Second Circuit agreed with the government that the district court erred in failing to apply a particular sentencing enhancement, and remanded for resentencing, noting that the additional enhancement "create[d] a new circumstance that might well justify a downward departure." United States v. Lauersen, 348 F.3d 329, 343 (2d Cir. 2003). Quotations:

> The District Court calculated the adjusted offense level under the Sentencing Guidelines to be 29. Starting from a base offense level of 6, the Court added 13 levels for the amount of the loss; 2 levels for more than minimal planning; 4 levels for

leadership role; 2 levels for abuse of trust; and 2 levels for obstruction of justice. The adjusted offense level of 29 in Criminal History Category I yielded a sentencing range of 87 to 108 months. See (Sentencing Table). The Court imposed a sentence of seven years and three months.

On the original appeal, we upheld the Government's contention, raised on its cross-appeal, that the District Court had erred in not increasing the adjusted offense level by an additional 4 levels pursuant to U.S.S.G. § 2F1.1(b)(8)(B). Lauersen, 348 F.3d at 343. That enhancement applies if the offense "affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense."[4] U.S.S.G. § 2F1.1(b)(8)(B). The revised adjusted offense level of 33, which we required to be used on remand, yielded a sentencing range of 135 to 168 months. The additional adjustment increased the minimum of Lauersen's sentencing range by 48 months (four years).

Before remanding, we ruled that the additional enhancement "creates a new circumstance that might well justify a downward departure." Lauersen, 348 F.3d at 343. As we explained, the new enhancement

substantially overlapped with the existing 13-level enhancement for the amount of the loss because "the large amount of money involved in the fraud significantly triggers both of them." We also noted that in Lauersen's case, the added adjustment increased the minimum of his sentencing range by four years, a much larger amount than would have resulted if his adjusted offense level had not placed him at such a high level in the sentencing table. Although recognizing that the two enhancements did not constitute impermissible double-counting, we concluded "that the cumulation of such substantially overlapping enhancements, when imposed upon a defendant whose adjusted offense level translates to a high sentencing range, presents a circumstance that is present 'to a degree' not adequately considered by the Commission." Id. (quoting 18 U.S.C. § 3553(b)(1)). For that reason we permitted the District Court to "exercise discretion to mitigate the effect of the enhancement by making a downward departure." End of quote.

3. Petitioner filed a petition for certiorari, which this Court denied. Lauersen v. United States, 541 U.S. 1044 (2004). He then filed a petition for rehearing; this Court ultimately granted the petition, vacated the decision below, and remanded for resentencing in light of United States v. Booker,

543 U.S. 220 (2005). Lauersen v. United States, 543 U.S. 1097 (2005).

On remand, Petitioner argued that, under Booker and Blakely v. Washington, 542 U.S. 296 (2004), the Sixth Amendment required the jury to determine the facts necessary to re-impose a restitution order beyond a reasonable doubt. But the district court rejected his argument. The district court resentenced Petitioner to 70 months' imprisonment; the amount of restitution remained unchanged.

At Dr. Lauersen's resentencing hearing on February 18, 2005, the Hon. William H. Pauley III stated as follows:

> "Prior to his indictment in this case, Lauersen could have been characterized as a public figure in New York; a published author, a busy and popular physician, and a crusader for fertility treatments for women in need. He openly maintained that insurance companies should be obliged to pay for fertility treatments. At the time of his trial and conviction, there was substantial public debate concerning insurance coverage for fertility treatments. Since that time, a number of states have enacted legislation imposing obligations on health insurance plans to that effect. Indeed, New York State enacted a law requiring health insurance plans to cover some

> fertility treatments in May 2002. New Jersey and Connecticut also have fertility coverage requirement. Thus, the animating force underlying the fraud, namely the reimbursement by insurance companies of certain fertility procedures, is now the law. Lauersen would not be prosecuted today if he was billing for some fertility procedures and characterizing them as such in accurate claim forms."

Thus, Niels Lauersen was convicted and served time for actions that would not be illegal today. It was only his desire to help women whose needs pre-dated New York's welcomed piece of legislation that made him a target.

4. Petitioner appealed the restitution order, continuing to argue that the district court's method of imposing it violated the Sixth Amendment. In an unpublished opinion, the Second Circuit affirmed the restitution order.

REASONS FOR GRANTING THE REHEARING

The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, requires judges to find facts, by a preponderance of evidence, necessary to issue a restitution order. Accordingly, this petition presents an "important and complex question," United States v. Sosebee, 419 F.3d 451, 461 (6th Cir. 2005): whether a restitution order, which is based on factual findings made by the district court by a preponderance of the evidence – rather than on

findings by a jury beyond a reasonable doubt – violates the Sixth Amendment's guarantee of a jury trial.

Several federal courts of appeals have acknowledged that this Court's recent Sixth Amendment jurisprudence – particularly Blakely v. Washington, 542 U.S. 296, 304 (2004), and United States v. Booker, 543 U.S. 220 (2005) – call into doubt restitution orders based on findings beyond those encompassed by jury verdicts.

This Court's Review Is Necessary To Force Federal Courts of Appeals to Abide By The Consequences of the Apprendi Rule.

While this Court often resists granting review of an issue when there is no conflict among the federal courts of appeals, this Court, for two reasons, should not hesitate to grant review here.

1. The pattern of lower courts' responses to this Court's Apprendi jurisprudence makes it highly unlikely that a conflict will develop here. Indeed, the lower courts have often refused to follow the implications of Apprendi until this Court has required them to do so. For example, the federal courts of appeals uniformly concluded following Apprendi and Ring v. Arizona, 536 U.S. 584 (2002), that the Sixth Amendment did not apply to the Federal Sentencing Guidelines. Yet this Court held in Blakely and Booker that, following Apprendi, it was "clear" that these sentencing systems ran afoul of the Sixth Amendment. Booker, 543 U.S. at 232.

Even after those unequivocal decisions, some state courts – the California, New Mexico, and Tennessee Supreme Courts – refused to implement Apprendi. People v. Black, 113 P.3d 534 (Cal. 2005), cert. granted and judgment vacated, 127 S. Ct. 1210 (2007); State v. Frawley, 106 P.3d 580 (N.M. Ct. App. 2004), cert. granted and judgment vacated, 127 S. Ct. 1214 (2007); State v. Gomez, 163 S.W.3d 632 (Tenn. 2005), cert. granted and judgment vacated, 127 S. Ct. 1209 (2007). This Court again had to grant certiorari to force those courts to toe the line. See Cunningham, 127 S. Ct. at 868-71. And most recently, the federal courts of appeals lined up in opposition to the advisory system this Court announced in Booker. This Court granted certiorari to remind these Courts of what it held in Booker. See Gall v. United States, 128 S. Ct. 586, 594 (2007); Kimbrough v. United States, 128 S. Ct. 558, 565-66 & n.4 (2007)

Acknowledging that "[a] literal application of [this] Court's language" in Blakely and Booker dictates the conclusion that federal restitution order violate the Sixth Amendment, Milkiewicz, 470 F.3d at 403, the federal courts of appeals refuse to take any step that would upset current sentencing norms until this Court orders them to do so. The time has come for this Court to step in.

Oregon v. Ice, U.S. No. 07-901.

This Court has granted certiorari in Oregon v. Ice, NO. 07-901, and has heard oral argument in the case this October. The question presented in Ice is whether the Apprendi doctrine applies to findings of

fact that are necessary for a court to impose consecutive sentences for two or more convictions. There is some overlap between the argument Oregon and 17 other States (as amicus curiae) advance in Ice.

In fact, seventeen states, filing as *amici curiae*, explicitly recognize the impact Ice could have on restitution orders. If Oregon Supreme Court's decision is left standing, they argue, "Apprendi would govern decisions whether to ...require restitution" because "a person who is both incarcerated and ordered to pay ...restitution is exposed to greater punishment than a person who is only incarcerated" and "often requires specific factual determinations that lie outside the jury's verdict." *Amici Curiae* Brief of Indiana et al., at 3, 12.

Lauersen was raised from $150,000.00 to $4.9 million dollars sentencing exposure at the whim of a judge without this monetary element determination by a jury. This dramatically increased his sentence and restitution in violation of his constitutional rights. This violated the Due Process of the defendant at trial in raising his U.S.S.G. exposure by a lesser standard or proof – preponderance of the evidence by a judge, versus beyond a reasonable doubt standard determined by a jury.

Petitioner requests this Honorable Court hold this rehearing decision until the Ice case is determined. This Honorable Court has granted petitions for rehearing on intervening circumstances of new and controlling Supreme Court decisions.

Fuentes v. United States, 516 U.S. 1022 (1995); Friend v. United States, 517 U.S. 1152 (1996). This Honorable Court has granted a petition for rehearing in cases of the same or related issues that have come before the Court and are still pending. Simmons v. Sea Land Services Inc., 459 U.S. 931 (1982); Forgett v. United States, 383 U.S. 926, 390 U.S. 203 (1968).

The Petitioner respectfully requests this Honorable Court vacate the denial of his petition for Writ of Certiorari decision and grant certiorari for briefing or in the alternative, summarily remand to the lower court to act accordingly with present and future Supreme Court precedent and authority.

CERTIFICATE OF PRO SE PETITIONER

Petitioner pro se certifies that the above petition for rehearing is presented in good faith and not for any delay and is restricted to the grounds specified in Rule 44.2.

Respectfully Submitted,

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APPENDIX A1

[February 4, 2000]

Doc crocked for 10 years

Stoned even while in O.R.

By GREG B. SMITH
DAILY NEWS STAFF WRITER

An upper East Side doctor yesterday admitted he was stoned on illegal drugs for nearly a decade while administering anesthesia to patients.

Dr. Neil Ratner – who used to work with such rock acts as Pink Floyd and Peter Frampton before becoming a physician – made the stunning admission while testifying against a former colleague at an insurance fraud trial in Manhattan Federal Court.

"In retrospect, I was pretty stoned a lot of the times I was giving anesthesia," Ratner said, recalling how he once passed out during an operation after mistakenly injecting himself with a drug that causes temporary paralysis.

Ratner, 48, dressed in a conservative black suit, testified that he and prominent fertility specialist Dr. Niels Lauersen routinely lied on insurance forms to get coverage for treatments not covered by insurers. Ratner, who has pleaded guilty to insurance fraud, is cooperating with prosecutors.

But before he could help Assistant U.S. Attorney Christine Chung make her case, he

admitted he'd been addicted to a variety of drugs while practicing medicine in the 1980s.

"There are very few drugs that I didn't do at one time or another," he said, sparking laughter from a courtroom audience that included many of Lauersen's patients.

Ratner – who earned his medical degree in Mexico – testified that in the 1970s he tried his hand managing such rock stars as Edgar Winter, Peter Frampton, and Emerson Lake and Palmer, and co-producing albums by Pink Floyd and Three Dog Night.

But his music industry work led to increased involvement in drugs. When he quit the music business in 1975, he didn't give up drugs.

"I started smoking marijuana, and it progressed from there to pills to cocaine, psychedelics," he said, recalling that he smoke pot and snorted coke daily during medical school.

When Ratner opened his own anesthesia practice, he dropped cocaine but continued with marijuana and LSD.

"But not in the office," he said. "That was a weekend sort of thing."

Soon, however, his addictions invaded his professional life. Ratner began ingesting pills and injecting narcotics, often writing for himself the kind

of bulk prescriptions that only anesthesiologists are allowed to write.

Before long, he was stealing drugs from doctors' offices and replacing the narcotics with water. He said he sometimes used the watered-down drugs during operations, "compensating," he said, by "adjusting the levels" of anesthesia.

By 1989, he said, he was injecting himself with drugs "every few hours or so."

That May, during an operation, Ratner said, he was so high that he mistakenly injected himself with a syringe he thought had morphine but actually was filled with a paralyzing agent. "I ended up on the floor paralyzed and barely able to breathe," he said. "The people around were horrified. They thought I had a heart attack."

After that, Ratner said, he entered a rehabilitation program for doctors and told people he was going on vacation at an Arizona ranch.

Thirty days later, he was back practicing anesthesia at New York clinics, which he continues to do today. Ratner was never disciplined for his actions. State health officials said he has a spotless record.